

Washington International Law Journal

Volume 14 | Number 2

4-1-2005

Forsaking the Forests for the Trees: Forestry Law in Papua New Guinea Inhibits Indigenous Customary Ownership

Alyssa A. Vegter

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wilj>



Part of the [Comparative and Foreign Law Commons](#), [Indian and Aboriginal Law Commons](#), and the [Natural Resources Law Commons](#)

Recommended Citation

Alyssa A. Vegter, Comment, *Forsaking the Forests for the Trees: Forestry Law in Papua New Guinea Inhibits Indigenous Customary Ownership*, 14 Pac. Rim L & Pol'y J. 545 (2005).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol14/iss2/9>

This Comment is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington International Law Journal by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

FORSAKING THE FORESTS FOR THE TREES: FORESTRY LAW IN PAPUA NEW GUINEA INHIBITS INDIGENOUS CUSTOMARY OWNERSHIP

Alyssa A. Vegter[†]

Abstract: Illegal logging in the tropical forests of Papua New Guinea is one of the greatest threats to the forests and indigenous people of this island nation. Increasing pressure from the commercial logging industry, legislation that restrains customary ownership, and an unclear legal basis for this ownership subjects the indigenous people of Papua New Guinea to unscrupulous, unsustainable, and illegal logging practices. As a region central to the preservation of global ecological and cultural diversity, the devastating consequences of illegal logging in Papua New Guinea have become nationally and internationally significant.

Customary ownership of the forests by the indigenous clans of Papua New Guinea is one of the best mechanisms for indigenous peoples to curtail these illegal activities. Because indigenous peoples are the most dependent upon and familiar with forest resources, they have the most incentive to protect them. Indigenous Papua New Guineans can claim constitutional customary ownership over ninety-seven percent of the forested land in their country. Their claim is further strengthened by international law, which calls for empowerment of indigenous peoples and recognition of their customary laws. The indigenous peoples of Papua New Guinea, however, cannot use their customary law to the fullest extent possible in protecting their forests until the Forestry Act of 1991 is revised and customary ownership is given a clear, legal basis through further development in the land courts.

I. INTRODUCTION

Illegal logging results in losses to governments of developing countries of at least US \$10 billion to US \$15 billion annually.¹ Illegal practices are linked with corruption, bad governance, and the impoverishment of rural communities that depend on forest products for their food and household needs.² In Papua New Guinea ("PNG"), eighty-

[†] The author would like to thank Professor Gregory Hicks and Professor Robert Anderson of the University of Washington School of Law, as well as the attorneys of the Rural Development Institute and the staff of *Pacific Rim Law & Policy Journal* for providing intellectual support and insightful critique of my ideas and writing. I am also particularly indebted to my friends and family for providing emotional support and guidance through this writing process. Any errors or omissions are entirely my own.

¹ THE WORLD BANK, SUSTAINING FORESTS: A DEVELOPMENT STRATEGY 1 (2004) [hereinafter WB SUSTAINING FORESTS]. A sampling of these countries includes Tanzania, Poland, India, Indonesia, Malaysia, Honduras, Belize, Pakistan, and Papua New Guinea. See generally *id.*, Appendices.

² See generally INTERNATIONAL DEVELOPMENT RESEARCH CENTRE, CUT AND RUN, ILLEGAL LOGGING AND THE TIMBER TRADE IN THE TROPICS 10 (Rob Glastra, ed., 1999) [hereinafter CUT AND RUN]. Illegal forest activities include all acts that relate to forest ecosystems, forest-related industries, and timber and non-timber forest products. They include acts violating rights to forest land, corrupt activities to acquire forest concessions, and activities at all stages of forest management and the forest goods production

five percent of the population is rural, and the majority of this population lives at subsistence levels and depends on a healthy, natural environment for survival.³ Despite this dependence, “[g]overnance has been particularly poor in the area of forestry, with the side effect of promoting corrupt practice and undermining environmental sustainability in logging activities.”⁴ Unchecked illegal logging deeply affects the indigenous peoples⁵ of PNG, who suffer losses of traditional sources of food, cultural destruction, and ruination of spiritually significant areas.⁶

Customary ownership, recognized by the Constitution of 1975 and numerous international instruments, can mitigate the problems caused by illegal logging.⁷ The Constitution of PNG recognizes custom as forming part of the underlying law of the country, along with adopted principles of English common law and equity.⁸ Through custom, local indigenous clans own ninety-nine percent of all forested land in PNG⁹ and manage most of

chain, from the planning stages to harvesting and transport of raw material and finished products to financial management. *Id.* at 10, 89-90. Illegal forest activities also include violations of indigenous peoples’ rights, public trust, and public or private ownership rights that may involve acts against constitutional, civil, criminal, or administrative law. See LUCA TACCONI ET AL., *LEARNING LESSONS TO PROMOTE FOREST CERTIFICATION AND CONTROL ILLEGAL LOGGING IN INDONESIA*, CENTER FOR INTERNATIONAL FORESTRY RESEARCH 3 (2004).

³ See Carl S. Bjerre, *Project Finance, Securitization and Consensuality*, 12 DUKE J. COMP. & INT’L L. 411, 431 (2002). See also ANIL AGARWAL AND SUNITA NARAIN, *PROMOTING PARTICIPATORY DEMOCRACY TO REDRESS ECOLOGICAL POVERTY: A VIEW FROM THE SOUTH 1* (1989) [hereinafter AGARWAL AND NARAIN].

⁴ WORLD BANK INSPECTION PANEL, *REQUEST FOR INSPECTION FILED BY CERTAIN NAMED CUSTOMARY OWNERS OF FORESTS IN KIUNGA-AIAMBAK, WESTERN PROVINCE, PAPUA NEW GUINEA 1* (Nov. 29, 2001) [hereinafter WORLD BANK INSPECTION PANEL].

⁵ The terms “customary owners” and “indigenous peoples” are used interchangeably in this Comment. For the purposes of international law, indigenous peoples are defined as those groups that “represent a common set of experiences rooted in historical subjugation by colonialism, or something like colonialism. Today, indigenous peoples are identified, and identify themselves . . . by reference to identities that pre-date historical encroachments by other groups and the ensuing histories that have challenged their cultural survival and self-determination as distinct peoples.” S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Towards the Multicultural State*, 21 ARIZ. J. INT’L & COMP. L. 13, 13-14 (2004). The customary landowning groups of PNG share historical experiences that pre-date colonialism, and have continually faced challenges to their survival and self-determination as distinct groups of people. See generally J.S. FINGLETON, *LEGAL RECOGNITION OF INDIGENOUS GROUPS*, FAO LEGAL PAPERS ONLINE 34 (1998), available at <http://www.fao.org/Legal/prsol/Ipo1.pdf> (last visited on Apr. 20, 2005).

⁶ See Bjerre, *supra* note 3, at 431. See also DANIELA RENNER, *PEOPLE IN BETWEEN: A CASE STUDY ON THE KUMIL TIMBER PROJECT 7* (Int’l Workgroup for Indigenous Affairs Doc. 65, 1990).

⁷ Rod Taylor, *The State Versus Custom: Regulating Papua New Guinea’s Timber Industry*, in *THE POLITICAL ECONOMY OF FOREST MANAGEMENT IN PAPUA NEW GUINEA* 249, 258 (Colin Filer ed., 1997) [hereinafter *State Versus Custom*].

⁸ *Id.* at 249.

⁹ COLIN FILER & NIKHIL SEKHARAN, *LOGGERS, DONORS & RESOURCE OWNERS* 30 (1998) [hereinafter *RESOURCE OWNERS*]. This is based on ninety-seven percent of the total land area that remained unalienated by the colonial government at the time of independence. This land was granted at independence in 1975 under customary ownership, and has increased modestly as customary groups

these lands as common property.¹⁰ This constitutionally guaranteed customary land ownership, combined with both the Fourth and Fifth Goals of the Constitution and numerous international instruments, provides support for the rights of customary owners to control their resources.¹¹ This control, however, is curtailed by the Forestry Act of 1991 and unclear definitions of customary ownership within the common law.

This Comment asserts that the commitment of constitutional and international law to customary ownership of forested land in PNG, if further strengthened and developed, can be effective in protecting the forests of PNG from illegal logging. Part II explores the varied environments and indigenous groups of PNG, the definitions and forms of customary ownership by which they govern themselves, and the illegal logging that threatens their survival. Part III argues that revising the Forestry Act of 1991 and developing a clear legal definition of customary ownership through the land courts will strengthen the rights of customary owners. Next, Part IV argues that stronger customary ownership of forests decentralizes control, giving indigenous groups and clans incentive to invest in and protect their forests from illegal logging. Ultimately, this protection ensures the survival of the indigenous cultures and forests of PNG.

II. ILLEGAL LOGGING THREATENS THE ECOLOGICAL AND CULTURAL DIVERSITY OF PNG

PNG contains one of the most biologically complex and culturally significant tropical rainforests remaining in the world.¹² There are roughly seven hundred languages spoken by the indigenous population of PNG, evidencing the extent of historical isolation and indigenous cultural variation

repossessed land given to others by the Australian colonial administration. See generally Fingleton, *supra* note 5. See also *State Versus Custom*, *supra* note 7, at 249.

¹⁰ JOHN WAGNER, "BLUE MOUNTAINS CONSTANTLY WALKING": THE RE-SIGNIFICATION OF NATURE AND THE RE-CONFIGURATION OF THE COMMONS IN RURAL PAPUA NEW GUINEA 2 (Resource Management in Asia-Pacific Working Paper No.24, 1999). Common property regimes are by far the dominant type of property system in PNG and throughout the Pacific Islands. *Id.*

¹¹ RESOURCE OWNERS, *supra* note 9, at iv. See also FOOD AND AGRICULTURE ORGANIZATION (FAO), LAW AND SUSTAINABLE DEVELOPMENT SINCE RIO: LEGAL TRENDS IN AGRICULTURE AND NATURAL RESOURCE MANAGEMENT 203 (FAO Legislative Study No. 73, 294, 2002). See also *Draft Declaration on the Rights of Indigenous Peoples*, U.N.HCHR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., Annex No. 1, U.N. Doc. E/CN.4/Sub.2/1994/56 (1994), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument) (last visited on Apr. 20, 2005).

¹² JOHN SOWEI ET AL., ENVIRONMENT MONITOR 7 (National Research Institute, 2002) [hereinafter ENVIRONMENT MONITOR].

among the groups that speak these languages.¹³ Separated into distinct linguistic groups and dependant upon their land for food and resource needs, the indigenous people of PNG have developed informal property law and customary ownership unique to their own localities.¹⁴ Often, these groups manage their resources communally.¹⁵ Looming over this framework of diverse cultures and forests is the threat posed by illegal logging.

A. *The Physical Geography of PNG Has Created Extensive Biodiversity and a Variety of Cultures*

The topography of PNG is extremely varied. Part of the island of New Guinea, plus over six hundred smaller islands and atolls make up PNG's land area of approximately 464,000 km².¹⁶ The main island consists of a high central ridge with outlying mountain ranges; it is bordered to the north and south by large, swampy flood plains. Many of the outlying islands are rugged mountains with narrow coastal fringes.¹⁷ Such extreme differences in elevation create a number of diverse and isolated ecosystems.

The forested area of PNG covers about 279,932 km² (with nearly seventy-seven percent natural forest) and is extremely diverse.¹⁸ PNG is home to approximately five to seven percent of the world's biodiversity, remarkable for such a small country.¹⁹ Mangroves flourish in coastal zones, rainforests and swamp forests grow in the lowlands, and eucalypt savannah and various forms of montane²⁰ forest thrive in the mid-elevation lands.²¹ Due to this large amount of ecological wealth in such a small country, ecologists designate PNG as a biological "hotspot."²²

¹³ See Robert D. Cooter, *Inventing Market Property: The Land Courts of Papua New Guinea*, 25 LAW & SOC'Y REV. 759, 761 (1991).

¹⁴ See Anaya, *supra* note 5, at 37. This is typical of traditional groups with distinct cultural, social and religious practices. *Id.*

¹⁵ See *Defending Papua New Guinea, An Interview with Brian Brunton*, Multinational Monitor, Vol. 17, No. 3 (March 1996), available at <http://multinationalmonitor.org/hyper/mm0396.06.html> (last visited Apr. 20, 2005) [hereinafter *Brian Brunton*]. See also WAGNER, *supra* note 10, at 2.

¹⁶ See RESOURCE OWNERS, *supra* note 9, at 13.

¹⁷ See *id.*

¹⁸ See ENVIRONMENT MONITOR, *supra* note 12, at 2 (2002).

¹⁹ See *id.* at 7.

²⁰ "[G]rowing in, or being the biogeographic zone of relatively moist cool upland slopes below timberline dominated by large evergreen trees." Webster's Ninth New Collegiate Dictionary 769 (1991).

²¹ See RESOURCE OWNERS, *supra* note 9, at 13. Within these regions live 304 mammal species, 15,000-20,000 plant species, 1,500 tree species, and 733 bird species. Among these are some unique species rarely found anywhere else on earth, such as tree kangaroos, birds of paradise, cassowaries, long-beaked echidnas, and the Queen Alexandria's Birdwing Butterfly, the largest butterfly on earth with a wingspan of up to ten inches.

²² See John Charles Kunich, *Fiddling Around While the Hotspots Burn Out*, 14 GEO. INT'L ENVTL. L. REV. 179, 191(2001). Hotspots are certain eco-regions, often within tropical forests, that contain

The indigenous people of PNG reflect the varied topography within which their cultures evolved. The 5.1 million people who live in PNG speak seven hundred different languages.²³ These languages represent their different kinship and community groups. Indigenous groups dwell in either traditional rural settlement patterns of villages containing populations of one hundred to five hundred people, or in scattered family homesteads that each contain much smaller populations.²⁴ Such variation results in identification with and allegiances to families, clans, and local villages.

1. Villagers Primarily Identify with Their Local and Traditional Societies

The indigenous people of PNG identify with their familial groups and clans. Unlike other civilizations with 100,000-year histories, the indigenous peoples of PNG remained decentralized in small clans of kinspeople that enjoyed large measures of equality and liberty within their own regions.²⁵ Their ethno-political roots are grounded in their loyalties to their clans, and are often far stronger than their loyalties to the state.²⁶ Though broader political commitments may exist,²⁷ allegiances are first and foremost based on traditional hierarchies between young and old men and between men and women.²⁸ Due to the localized nature of the indigenous populations and

"exceptional concentrations of species with exceptional levels of endemism" and that "face exceptional degrees of threat." *Id.* at 181.

²³ See RESOURCE OWNERS, *supra* note 9, at 27.

²⁴ See *id.* The Kumil Timber Rights Purchase area, which encompasses seven different language groups, exemplifies this social structure. Of these groups, the Bunabun, Uligan, Meiwo, and Ulatepun represent larger settlement centers, but people here may still share some language base with the Ereinduk, Pepaur, Toavult-Korak, Meriwok, Tarikapa, Aleswan, or Gugubar language groups. RENNER, *supra* note 6, at 41.

²⁵ See Cooter, *supra* note 13, at 761. Archeological studies have shown drainage tunnels cut into the Wahgi Valley to be 9000 years old. Over thousands of years, the isolating topography played a part in preventing the unification of Papua New Guinians under a single administration, as well as any development of permanent classes of slaves, serfs, landless paupers, tenants, nobles, kings, or landlords. *Id.*

²⁶ See RENNER, *supra* note 6, at 7.

²⁷ U.S. DEPARTMENT OF STATE, BUREAU OF EAST ASIAN AND PACIFIC AFFAIRS, BACKGROUND NOTE: PAPUA NEW GUINEA (2004), <http://www.state.gov/r/pa/ei/bgn/2797.htm#political> (last visited Feb. 22, 2005). Because PNG is based on a Parliamentary system inherited from the colonial Australian Administration, these regionally-based parties compete for power in a 109-seat unicameral Parliament. PNG's politics are highly competitive with most members elected on a personal and ethnic basis rather than as a result of party affiliation. Currently, the Melanesian Alliance Party, led by Michael Somare, who had previously served as PNG's first Prime Minister, holds nineteen seats, making it the single largest party in Parliament. Other parties include the National Alliance, People's Progress Party, Pangu Pati, and People's Democratic Alliance. *Id.*

²⁸ RENNER, *supra* note 6, at 7.

their subsistence lifestyles, the villagers' interests tend to revolve around their natural resource base.

2. *Most Indigenous Groups of PNG Depend on the Forests of Their Customary Land for Food and Subsistence Needs*

Eighty-five percent of the population of PNG continues to live in rural areas and is thus dependent upon their customary land for survival.²⁹ In forested areas, rural villagers rely upon the forest for a variety of subsistence resources.³⁰ For example, the customary landowners of forests in Kiunga-Aiambak, Western Province, use their forests for the collection of housing material for temporary birthing houses, building material for canoes, access to sago palms which provide their local food staple, and hunting grounds for animal protein.³¹ The forest ecosystems ensure clean and free-flowing streams for water consumption, household use, and transport.³² In the Kumil region in the Madang province, the indigenous population depends upon the tropical rainforest to supply the entire basis for their livelihood: land for gardens, hunting and fishing grounds, gathering of legumes, spices, mushrooms, protection and shade, water, and materials for houses, canoes, and ritual items.³³ For these groups, as well as for many others, their forested lands also represent sacred and spiritual places upon which they base their oral tradition, language, and culture.³⁴

B. *Unique and Local Forms of Customary Ownership Have Emerged from This Variety of Cultures*

Customary ownership applies to over ninety-seven percent of all the land in Papua New Guinea.³⁵ Customary ownership is proprietary or possessory land ownership by which families, clans, or larger customary groups generally own the land.³⁶ Ninety-nine percent of all forested land is

²⁹ RESOURCE OWNERS, *supra* note 9, at 27.

³⁰ BERIT GUSTAFSSON, RURAL HOUSEHOLDS AND RESOURCE MANAGEMENT IN PAPUA NEW GUINEA 6 (Resource Management in Asia-Pacific Working Paper No. 32, 2002). These resources include timber, household items, firewood, food from the undergrowth such as fruit, nuts and oils, medicinal plants and herbs, and water and fish from the rivers and streams. *Id.*

³¹ WORLD BANK INSPECTION PANEL, *supra* note 4, at 17.

³² *Id.*

³³ RENNER, *supra* note 6, at 31.

³⁴ WORLD BANK INSPECTION PANEL, *supra* note 4, at 17. See also Bjerre, *supra* note 3, at 431.

³⁵ ROMILLY L. KILA PAT, CUSTOMARY LAND TENURE IN A CHANGING CONTEXT, DEPARTMENT OF LANDS AND PHYSICAL PLANNING 1 (2003).

³⁶ Brian Brunton, *supra* note 15.

owned customarily.³⁷ In a country of seven hundred different clans and groups, customary ownership divides the land into small landholding entities, defended communally, with resources allocated according to reciprocal obligations.³⁸

1. *The Details of Customary Ownership Vary in This Diverse Context*

Cultural, social, and religious practices of traditional societies create informal property laws and customary ownership.³⁹ The PNG Constitution defines custom as "the usages of indigenous inhabitants of the country existing . . . at the time . . . and [in] the places . . . [in] which the matter arises, regardless of whether or not the custom . . . has existed from time immemorial."⁴⁰ In a property context in a society as diverse as PNG, this may mean that one clan's inheritance rules follow patrilineal lines, while another clan's inheritance rules follow matrilineal lines. One clan may forbid the sale of any parcels of land, while another may forbid the sale of land to anyone outside of the clan. Alternatively, one clan may claim ownership over land through use, while other clans may consider conquest as the only means to claim customary ownership.

Such variation in ownership rules is not conducive to answering the question of who owns the land.⁴¹ Dr. Peter Sack, professor at the University of Papua New Guinea, writes:

[a]lthough the traditional right to control the land resembles in some ways the Western concept of ownership, the group does not own the land it controls in the traditional sense. Land within a group's sphere of control remains ownerless. Further, not only the non-ownable land but also the ownable objects on the land remain ownerless when the right of control is established. The right of control merely constitutes a claim that the members of the group are entitled to acquire the ownership of these objects and that outsiders are not entitled to do so, unless they have the group's permission.⁴²

³⁷ RESOURCE OWNERS, *supra* note 9, at 30.

³⁸ Brian Brunton, *supra* note 15. See also Cooter, *supra* note 13, at 768-69.

³⁹ Anaya, *supra* note 5, at 37.

⁴⁰ PAPUA N.G. CONST. sch. 1.2(b) (1975).

⁴¹ Cooter, *supra* note 13, at 768.

⁴² PETER SACK, LAND BETWEEN TWO LAWS: EARLY EUROPEAN LAND ACQUISITIONS IN NEW GUINEA 41 (1973).

Thus, the rights of full ownership are often unbundled and dispersed among different people or groups.⁴³ Such fragmented ownership may mean that a family within a clan has the right to collect certain foods from a tract of forest, but does not have the right to harvest timber for sale. Alternatively, it may mean that they can harvest timber, but only for their own uses, with limits set by mutual clan agreements.

Not surprisingly, the variables of customary ownership present a challenge to judicial interpretation. The Supreme and National Courts of PNG provide vague rules regarding the interpretation of customary ownership. The leading case from the National Court is *State v. Giddings*, in which two clans, the Ambai and the Pialin, continued their lengthy dispute regarding the boundary between their customary lands.⁴⁴ The provincial land court delineated the boundary without proper notice to the parties, without allowing them to present their cases in each other's presence, and without holding public hearings.⁴⁵ The National Court held that the provincial land court had not observed the rules of natural justice, an action that was inconsistent with the Land Disputes Settlement Act of 1975, which required the court to "endeavor to do substantial justice between all persons interested, in accordance with this Act and any relevant custom."⁴⁶ Finally, the National Court made substantive findings as to the relative weight given to different and conflicting customary laws.⁴⁷

A second important case involves an issue of "standing" for an appeal of a decision of the Provincial Land Courts. Augustine Olei, as representative of two customary landowning clans, applied for an order to quash a decision of the Provincial Land Court.⁴⁸ The Provincial Land Court had determined that ownership of the land known as Vanapa East fell to the government, which could then sell the land to prospective vendors.⁴⁹ The National Court found that, although the customary owners were not party to the original proceedings before the Provincial Land Court, they still had

⁴³ See Cooter, *supra* note 13, at 769.

⁴⁴ See *State v. Giddings*, [1981] P.N.G.L.R. 423. There had been four previous court proceedings between the two clans, as well as four deaths over the disputed boundary. *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Cooter, *supra* note 13, at 796 n.59 citing *State v. Giddings* [1981] P.N.G.L.R. 423. Writing for the court, District Court Deputy Chief Judge Kearney supported the approach of testing competing traditional accounts by reference to recent and existing facts established by evidence, and seeing, in the light of that, which of the two competing accounts is more probable. He pointed to further case-law that has adopted this approach. See *Re Veakabu Vanapa*, (Unreported pre-Independence Supreme Court judgment 547, (1969)); *Lilumpat Land Owning Group v. The Ianu and Sausau Clans of Kranket Re Piawai, Pig and Masas Islands*, [1974] P.N.G.L.R. 235. *State v. Giddings* [1981] P.N.G.L.R. 423.

⁴⁸ *Auguste Olei v. The Provincial Land Court at Port Moresby* [1984] P.N.G.L.R. 295.

⁴⁹ See *id.*

“sufficient interest” as “person[s] aggrieved” to bring their action.⁵⁰ Though the Court cautioned that it was not finding actual ownership in this case, it provided strong precedent for customary landowners’ abilities to assert customary landowning rights.⁵¹ By establishing such precedent, the Court recognized and enforced the generally communal nature of customary landowning rights.⁵² Thus, although there are a great many forms of customary ownership, communal ownership provides a common framework.

2. *Common Property Regimes Provide a Framework for These Varieties of Customary Ownership*

Customary owners of forestland in PNG use common property regimes to allocate use rights between members.⁵³ This means that their forest resources are owned by an identified group of people invested with the right to exclude others and the responsibility to maintain their resource.⁵⁴ Clans have addressed the challenges of excludability and subtractibility⁵⁵ by developing ownership schemes that involve long-run relations with many reciprocal obligations.⁵⁶ Thus, property is not necessarily defined as the right of persons over things, but as obligations owed between persons with respect to things.⁵⁷ For example, a clan may be able to assert their ownership over a certain tract of trees if it had fulfilled its promise to a downstream clan not to divert water. Similarly, a family may be able to assert its rights to collect timber for building materials if it had participated in guarding the forest. Such ownership provides an incentive structure that enhances coordination, cooperation, and investment amongst resource-using

⁵⁰ See *id.* citing *In re Poriton 56 Morobe*, [1971] P.N.G.L.R. 442.

⁵¹ See *id.*

⁵² See *infra* Part III.C.2 and note 130.

⁵³ See WAGNER, *supra* note 10, at 2. Common property regimes are by far the dominant type of property system in PNG and throughout the Pacific Islands. See *id.*

⁵⁴ See S. Movik, Some Notes on Common vs. Private Property Rights to Natural Resources 3 (2004), at http://dlc.dlib.indiana.edu/archive/00001447/00/Movik_Some_040427_Paper131.pdf (last visited Apr. 20, 2005). The rules of common property management regimes most often apply to a common pool resource. ELINOR OSTRUM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 29 (1990). Common pool resources can be natural or man-made resource systems that are large enough to make it costly to exclude others from using the resource. *Id.*

⁵⁵ See S. Movik, *supra* note 54, at 3. Excludability refers to the costs of excluding non-owners through physical barriers or legal instruments, while subtractibility involves the fact that benefits consumed by one individual subtract from the benefits available to others. *Id.*

⁵⁶ See Cooter, *supra* note 13, at 769 n.59. See also MAX GLUCKMAN, THE IDEAS IN BAROTSE JURISPRUDENCE 171-73 (1975).

⁵⁷ See *id.*

groups to protect their forests, and reflects operational rules of indigenous land use already in place.⁵⁸

C. *Illegal Logging Threatens to Destroy Unique Regions of Ecological and Cultural Diversity in PNG and the Efficient and Equitable Frameworks That Govern Them*

Unsustainable logging dramatically affects local communities by disrupting their customary forms of resource use.⁵⁹ Among these unsustainable practices, illegal logging is a catalyst for the most severe forest degradation.⁶⁰ The logging industry uses earnings to finance further access into the forest, leaving roads open for both large- and small-scale loggers as well as landless cultivators who use slash and burn techniques.⁶¹ Increased access to forest lands creates greater ecological disturbance such as habitat fragmentation, watershed degradation, erosion, and local and regional extinction.⁶²

In 1998, the forests of PNG faced a crisis caused by liquidation and corruption. The government decided to liquidate large tracts of forest areas in order to balance its budget, but allowed deficient logging practices, ignorance of required logging procedures, and corruption to undermine environmental sustainability.⁶³ As a result, customary landowners were short-changed through the alienation of their resources.⁶⁴ The groups most affected were those living in the lowland and coastal areas where there is a high concentration of commercially accessible timber.⁶⁵

⁵⁸ CUSTOMARY LAND TENURE: REGISTRATION AND DECENTRALIZATION IN PAPUA NEW GUINEA 42 (Peter Larmour ed., The National Research Institute 1991) [hereinafter CUSTOMARY LAND TENURE].

⁵⁹ See THE WORLD BANK AND THE FORESTS IN PAPUA NEW GUINEA, THE WORLD BANK, at <http://siteresources.worldbank.org/INTPAPUANEWGUINEA/Data%20and%20Reference/20211798/NB+Forestry+Brief.pdf> (last visited on Apr. 20, 2005).

⁶⁰ See generally CUT AND RUN, *supra* note 2, at 2-11.

⁶¹ Elli Louka, *Cutting the Gordian Knot: Why International Environmental Law is Not Only About the Protection of the Environment*, 10 TEMP. INT'L & COMP. L.J. 79, 93 (1996).

⁶² Curt Wilson, Comment, *The 1995 Salvage Timber Sale Rider: A Recipe for Environmental Devastation*, 5 DICK. J. ENVTL. L. & POL'Y 419, 423 (1996). See also, RESOURCE OWNERS, *supra* note 9, at 22. These destructive practices include feeder roads being constructed on a trial-and-error basis, little use of directional felling techniques, excessive use of dozer and bulldozer blades, and failure to cut vines when felling, which brings down smaller trees. Lack of adherence to environmental regulations, such as disregarding restrictions on logging on slopes over thirty degrees, along watercourses, and other sensitive ecosystems, results in soil compaction. This compaction prevents seedlings from taking root, causing formation of excessive gaps in the canopy, altering micro-climates, and suppressing regrowth of valuable species. Between thirty and seventy percent of residual trees suffer mortality as a consequence of logging or the physiological stress following harvest. *Id.*

⁶³ WORLD BANK INSPECTION PANEL, *supra* note 4, at 2.

⁶⁴ *Id.*

⁶⁵ See *State Versus Custom*, *supra* note 7, at 249.

In an attempt to halt this destruction and meet the conditions of a loan from the World Bank, the PNG government issued a moratorium on any new or extended timber permits.⁶⁶ This moratorium was to last until National Forest Authority evaluations found all current logging proposals to be in accordance with the Forestry Act of 1991.⁶⁷ The Forest Authority, however, continued to issue permits for "road-line clearance[s]," setting up base camps for "advance roading," and harvesting logs, all in direct breach of this moratorium.⁶⁸ Recognizing that the moratorium was not an effective mechanism to protect the forests, the government allowed the moratorium to lapse in 2001, drawing both praise and criticism from all parties involved.⁶⁹

Illegal logging is also linked with political corruption. Income from the timber industry is a major source of funding for political parties and politicians in PNG.⁷⁰ At the national level, logging companies obtain the right to log by bribing politicians and leaders, who in turn issue permits outside of the established legal process for resource allocation.⁷¹ The Independent Forestry Review, set up in response to the conditions of the World Bank loan, found that of thirty proposed new concessions areas, four were already being illegally logged and attempts had been made to illegally grant permission for logging in at least another ten areas.⁷² This endemic corruption fuels environmental destruction and destroys the lives of PNG's rural populations, who are losing their food sources and suffering the negative social impacts of logging.⁷³ Fortunately, customary ownership, recognized by the Constitution of 1975 and numerous international instruments, can mitigate the problems caused by illegal logging.⁷⁴

⁶⁶ See COLIN FILER, NAVROZ K. DUBASH & KILYALI KALIT, *THE THIN GREEN LINE: WORLD BANK LEVERAGE AND FOREST POLICY REFORM IN PAPUA NEW GUINEA* 87 (The National Research Institute 2000).

⁶⁷ *Id.* at 87.

⁶⁸ See WORLD BANK INSPECTION PANEL, *supra* note 4, at 8. In particular, customary owners feared that these clearances and base camps would result in uncontrolled logging. Permission to conduct these activities was revoked in both cases, but while deliberations occurred, over 21,000 square meters of logs were cut. *Id.*

⁶⁹ See *Papua New Guinea NGOs Slam Government Over Logging Moratorium*, FOREST CONSERVATION NEWS TODAY, Dec. 9, 2001.

⁷⁰ See Yati Bun, *Corruption and the Forest Industry in Papua New Guinea*, RADIO AUSTRALIA, http://abc.net.au/timetotalk/english/opinion/TimeToTalkOpinion_440064.htm (last visited Apr. 20, 2005).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* See CUT AND RUN, *supra* note 2, at iv. See also WB SUSTAINING FORESTS, *supra* note 1, appendix A-23. "Politically motivated and protected concessions usually exclude local populations, especially indigenous forest dwellers, from using and benefiting from the forests." *Id.*

⁷⁴ See *State versus Custom*, *supra* note 7, at 258.

III. NATIONAL LEGISLATION AND UNDERDEVELOPED PROPERTY LAW UNDERMINE CONSTITUTIONAL AND INTERNATIONAL SUPPORT FOR CUSTOMARY OWNERSHIP

Constitutionally guaranteed customary land ownership, combined with constitutional and international instruments, support customary owners' rights of control over their resources.⁷⁵ However, the Forestry Act of 1991, which restrains customary landowners' abilities to directly negotiate and consult with commercial timber industries, severely weakens customary ownership. Unclear definitions of customary ownership within the common law further weaken indigenous groups' abilities to control their forests.⁷⁶ Without formal definitions of customary ownership, a court may not recognize indigenous groups' claims of ownership.

In order to make customary law effective as an instrument of protection of indigenous rights to forest resources, PNG should revise the Forestry Act of 1991, and the land courts should develop a clear legal basis for customary ownership through mediation and adjudication. Recognizing the rights of forest communities allows the communities to make resource allocation decisions about the resources they are most dependent upon, and can be effective in protecting the forests, biodiversity and indigenous peoples of PNG. The Constitution provides the foundations of customary ownership in PNG and numerous international instruments give further support.

A. *The Constitution Recognizes Customary Ownership as One of the Central Elements of Papua New Guinean Law*

Customary law applies to ninety-seven percent of the land in PNG. The principles of custom were adopted at independence by the Constitution of 1975.⁷⁷ Schedule 2.1 of the Constitution adopts custom as part of the underlying substantive law along with the principles and rules of common law and equity.⁷⁸ Customary law applies to any appropriate matter, as long as it is not "repugnant" to the Constitution, statute, or general principles of

⁷⁵ See RESOURCE OWNERS, *supra* note 9, at vi. See also *Draft Declaration on the Rights of Indigenous Peoples*, *supra* note 11.

⁷⁶ See generally Cooter, *supra* note 13, at 773. "The formalization of customary law by the land courts has not proceeded far enough to eliminate the uncertainties and risks attending these transactions." *Id.*

⁷⁷ PAPUA N.G. CONST. sch. 2.1, 2.2.

⁷⁸ *Id.*

humanity.⁷⁹ Supreme Court and National Court decisions have incorporated custom into the common law of property by reconciling constitutional and legislative intent with substantive customary law.⁸⁰

The Constitutional recognition of custom is the key policy consideration influencing forest use.⁸¹ The Fourth and Fifth Goals of the Constitution call for the "natural resources and environment to be conserved and used for the collective benefit of us all, to be replenished for the benefit of future generations"⁸² and for development "primarily through the use of Papua New Guinean forms of social, political and economic organizations."⁸³ Recognition of custom occurs in several other sections of the Constitution, providing the foundation for customary ownership in PNG.⁸⁴ In addition, indigenous rights to control resources are also supported by international law.

B. Recognition of Indigenous Peoples' Rights Is Currently a Central Theme in International Law

Contemporary international concern for indigenous peoples acknowledges the "importance of land and resources to the survival of indigenous cultures, and, by implication, to indigenous self-determination."⁸⁵ Several declarations and covenants lay the foundation for this concern. This includes the United Nations Universal Declaration of Human Rights of 1948, which protects various individuals and groups from

⁷⁹ *Id.*

⁸⁰ See generally *Ene Land Group Inc. v. Fonsen Logging (PNG) Pty Ltd and GR Logging Pty Ltd*, [1998] P.G.N.C. 9; *Re Hides Gas Project Land*, [1993] P.N.G.L.R. 309; *Auguste Olei v. The Provincial Land Court at Port Moresby* [1984] P.N.G.L.R. 295; *State v. Giddings* [1981] P.N.G.L.R. 423; *Ex Parte Tiakon Koan for the Ambai Clan of Laiagam*, [1981] P.N.G.L.R. 423; *Allan Sannga, Peter Timereke v. Duncan Farria and Anor*, [1983] P.N.G.L.R. 142 (maintaining that customary law develops from time to time and may evolve its own customary rules to 'modern' property such as shares in a company). See Kenneth Brown, *Customary Law in the Pacific: An Endangered Species?*, J. SOUTH PAC. L. 8 n.31 (1999), available at http://www.vanuatu.usp.ac.fj/journal_splaw/articles/Brown1.htm (last visited Feb. 22, 2005).

⁸¹ *RESOURCE OWNERS*, *supra* note 9, at iv.

⁸² PAPUA N.G. CONST., National Goals and Directive Princs., Goal IV (1975).

⁸³ *Id.* Goal V.

⁸⁴ See generally PAPUA N.G. CONST., Preamble, §45 (religion); §53(5)(d) (disallowing the acquisition of customarily owned land); §54 (special provisions in regards to certain lands); §67 (eligibility for naturalization requires respect for the customs and cultures of the country); §78 (adoption); §130 (integrity of candidates); §171 (authorizing Parliament to establish other courts intended to deal with matters primarily by custom or in accordance with customary procedures); sch. 1.2(1)(b) (defining custom); sch. 2.3(1)(c) (establishing that where there is no underlying law, the National and Supreme Courts have a duty to draw analogies from custom), and sch. 2.11 (providing that court decisions overturning custom may not be applied retroactively).

⁸⁵ Anaya, *supra* note 5, at 35.

state acts that may deprive them of property.⁸⁶ The U.N. Committee on the Elimination of Racial Discrimination has called upon the states to provide indigenous peoples with conditions allowing for sustainable economic and social development compatible with cultural characteristics.⁸⁷ PNG answered this call by ratifying the International Covenant on the Elimination of all Forms of Racial Discrimination in 1965.⁸⁸ Specifically, it provides that no decisions directly relating to indigenous peoples' rights and interests can be taken without their informed consent.⁸⁹

A prominent international affirmation of indigenous rights, cultural integrity, and group identity is the International Labor Organization's Convention on Indigenous and Tribal People.⁹⁰ Article 14(1) of this Convention recognizes the collective character of indigenous ownership rights, affirming that "the rights of ownership and possession of [indigenous peoples] over the lands which they traditionally occupy shall be recognised."⁹¹ Articles 15(1) and 15(2) require states to safeguard indigenous peoples' rights to "participate in the use, management and conservation of their resources," asserting that they have a say in any exploration or extraction on their lands, a right to benefit from those activities, and a right to a process of consultation in regards to any resource

⁸⁶ Jacqueline F. Pruner, Comment, *Aboriginal Title and Extinguishment Not So "Clear and Plain": A Comparison of the Current Marori and Haida Experiences*, 14 PAC RIM LAW & POL'Y J. 253, 257-58 (2005). See also U.N. Universal Declaration of Human Rights 1948, G.A. Res. 217A, U.N. GAOR, 3rd Comm., U.N. Doc. A/810 (1948), available at <http://www.unhchr.ch/udhr/lang/eng.htm> (last visited Apr. 20, 2005).

⁸⁷ See generally *International Convention on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 2106XX, 660 U.N.T.S. 195 (1969), available at <http://www.ohchr.org/english/law/cerd.htm> (last visited Apr. 20, 2005). See also Anaya, *supra* note 5, at 19.

⁸⁸ See U.N. Development Program Human Development Reports, http://hdr.undp.org/statistics/data/cty/cty_f_PNG.html (last visited Apr. 20, 2005). PNG ratified this covenant on Feb. 26, 1982. See also U.N., *Status of Ratifications of the Principal International Human Rights Treaties*, U.N. HCHR, available at <http://www.unhchr.ch/pdf/report.pdf> (last visited Apr. 20, 2004).

⁸⁹ *Id.* See also Anaya, *supra* note 5, at 19.

⁹⁰ Anaya, *supra* note 5, at 23. The provisions of The International Labor Organization's ("ILO") Convention No. 169 of 1989 have been framed with the cooperation of the United Nations; the Food and Agriculture Organization of the U.N.; the U.N. Educational, Scientific, and Cultural Organization; and the World Health Organization. See Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), U.N. Gen. Conf. of the International Labor Organization, Sess. 67 (1991) [hereinafter ILO Convention No. 169].

⁹¹ ILO Convention No. 169, art. 14(1).

extraction that may in some way affect their lives.⁹² While PNG has yet to sign this Convention, several NGOs are advocating for its ratification.⁹³

The Convention on Biodiversity ("CBD") further represents the international community's commitment to the preservation of biodiversity and indigenous rights. The CBD, by identifying the problem of dwindling diversity, sets overall goals, policies, and general obligations, as well as organizes technical and financial coordination.⁹⁴ As a party to the CBD, PNG is obliged to develop a national biodiversity strategy and action plan, and file reports on efforts to implement treaty commitments.⁹⁵ Several articles of the Convention lay out the requirements for a biodiversity plan, including protection of indigenous peoples' practices. Though the execution of each requirement is "subject to" the legislation of the state,⁹⁶ Article III affirms the responsibility of member states to ensure that "activities within their jurisdiction or control do not cause damage to the environment of other States or of other areas beyond the limits of [their] national jurisdiction."⁹⁷ Recognizing the global consequences of the loss of biodiversity, this provision allows for national sovereignty, but also checks potential abuse by requiring accountability in an international context.⁹⁸

Other international plans and policies have developed guidelines and examples for strengthening the role of indigenous peoples in their communities. Despite the international community's recognition of indigenous ownership rights, customary ownership in PNG is limited by the Forestry Act of 1991.

⁹² *Id.* arts. 15(1), 15(2), and 6(2). See also Manuela Tomei & Lee Swepston, *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169* ¶ 8 (Int'l Labor Org. 1996), at http://labordoc.ilo.org/cgi-bin/Pwebrecon.cgi?v1=1&ti=1,1&Search_Arg=Tomei&SL=None&Search_Code=NAME_&PID=13507&CNT=30&HC=7&SEQ=20050506194221&SID=7 (last visited Apr. 20, 2005).

⁹³ John Scott Murphy, "Indigenous People – What's in a Name?" Australia Human Rights Centre (Aug. 24, 1995), available at <http://www.austlii.edu.au/au/other/ahric/hrd/August95/indig.html> (last visited Apr. 20, 2005).

⁹⁴ Kunich, *supra* note 22, at 187.

⁹⁵ Convention on Biological Diversity of the United Nations Conference on the Environment and Development, June 5, 1992, U.N. Doc DPI/1307, arts. 7, 26, available at <http://www.biodiv.org/doc/legal/cbd-en.pdf> (last visited Apr. 20, 2004) [hereinafter Convention on Biological Diversity].

⁹⁶ G.F. Maggio, *Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity*, 16 UCLA J. ENVTL. L. & POL'Y 179, 211 (1998). This is a very broad qualification.

⁹⁷ Convention on Biological Diversity, *supra* note 95, art. 3.

⁹⁸ Kunich, *supra* note 22, at 189.

C. *The Forestry Act of 1991 Curtails the Sovereignty of Customary Ownership*

The Forestry Act of 1991 ("the Act") restrains customary owners' constitutional right to directly negotiate and consult with commercial timber industries. The PNG government enacted this law to protect landowning groups from manipulation and abuse in direct, unchecked negotiations with logging companies.⁹⁹ To achieve this protection, the Act implemented government control over allocation of timber rights, creating an intermediary between the customary owners and commercial timber companies. Despite its goals, the Act has many adverse effects and warrants a revision to strengthen customary ownership rights.

1. *While Well-Intentioned, the Act Removes Customary Landowners from Decisions Impacting Their Forests*

A history of excessive forest extraction led to the need to protect customary landowners from the unscrupulous dealings of loggers.¹⁰⁰ In response to this need for protection, Parliament enacted the Forestry Act of 1991.¹⁰¹ This Act prescribes a process of "resource acquisition" in which the National Forest Authority enters into a Forest Management Agreement ("FMA") with customary landowners.¹⁰² Under the FMA, the State will manage the forests for a "term of sufficient duration in order to allow for proper forest management measures to be carried out to completion."¹⁰³

⁹⁹ RESOURCE OWNERS, *supra* note 9, at 180.

¹⁰⁰ *State versus Custom*, *supra* note 7, at 250. In 1989, the Barnett Commission of Inquiry documented an "out of control" timber industry tainted by pervasive corruption, transfer pricing, and reckless logging practices. The potential for logging companies to abuse and manipulate landowning companies was attributed in part to the Forestry (Private Dealings) Act of 1971 and the Forestry Act (Amalgated) of 1973. These acts allowed either unchecked direct dealings with timber-harvesters or government restrictions imposed without consideration of the customary landowners, and were repealed by the Forestry Act of 1991. See RESOURCE OWNERS, *supra* note 9, at 3-10.

¹⁰¹ See JIM FINGLETON, REGIONAL STUDY ON PACIFIC ISLANDS FORESTRY LEGISLATION, FAO LEGAL PAPERS ONLINE No. 30, 5-6 (June 2002) [hereinafter Fingleton on Forestry Legislation]. The Act has been revised a number of times, first by the Forestry Act (Amendment) of 1993, and further amendments in 1996 and 2000. The 1991 Act remains the main forestry law, and amendments have been taken into account. *Id.* at 12.

¹⁰² See RESOURCE OWNERS, *supra* note 9, at 180. Allowances are made for FMAs to be executed by the "authorized agents" of the owners, provided that seventy-five percent of the adult resident members of the landowning groups give their written consent. *Id.* See also Forestry Act of 1991, Part III, Div. 4, §§ 56(1) and 57(2)(b) (Papua N.G.).

¹⁰³ Forestry Act of 1991, Part III, Div. 4, §58(d) (Papua N.G.).

The National Forest Authority's virtual monopoly over the acquisition of harvesting rights¹⁰⁴ through FMAs creates numerous problems. First, because the National Forest Authority is concerned with ensuring an adequate timber supply to maintain the industrial base of the timber industry, most FMAs do not specifically ensure the sustainability of forests.¹⁰⁵ Second, even if appropriate provisions for sustainability are incorporated into the FMA, the National Forest Authority often lacks the capacity or will to regulate vast tracts of forest.¹⁰⁶ Third, even after entering the FMA with the indigenous landowning groups ("Land Groups"),¹⁰⁷ the National Forest Authority accepts proposals from commercial logging companies.¹⁰⁸ Submitted proposals for timber permits must meet Project Guidelines, which are developed in consultation with the customary landowners.¹⁰⁹ Once proposals are submitted, however, the evaluations of these proposals do not include consultation with the customary owners, especially if the boundaries of the Timber Permit Area do not correspond to the area covered by one, single clan of landowners.¹¹⁰ As a result of this exclusion, the landowners do not have legal control over which timber company holds the permit, the

¹⁰⁴ See Fingleton on Forestry Legislation, *supra* note 101, at 20.

¹⁰⁵ LYNNE ARMITAGE, CUSTOMARY LAND TENURE IN PAPUA NEW GUINEA: STATUS AND PROSPECTS, 8 (2001).

¹⁰⁶ RESOURCE OWNERS, *supra* note 9, at viii. This is evidenced by continued permitting of logging outside of the requirements of the Act and newspaper headlines that reveal numerous violations of forest law and customary ownership. See, e.g., *supra* note 68, for a description of illegal permitting in the Kiung-Aiambak customary lands, as well as the Pondo and Tuwapu areas; RENNER *supra* note 6, at 14; see also Alex Rheeney, *Maintain Forestry Review Report in its Entirety*, PNG POST-COURIER, Aug. 18, 2004 available at LEXIS, Allwld File; *NGO calls ECP help*, PNG POST-COURIER, Sept. 10, 2004, available at LEXIS, Allwld File; *Outrage at Teak Export*, PNG POST-COURIER, May 17, 2004, available at LEXIS, Allwld File.

¹⁰⁷ *State Versus Custom*, *supra* note 7, at 250. Indigenous landowning groups can incorporate under the Land Groups Incorporation Act of 1974. See RESOURCE OWNERS, *supra* note 9, at 180-81. Through this device, clans became legal corporations run according to customary law. *Id.* Title to the land must be vested in these groups or registered under a law providing for the registration of title to customary land. *Id.* In situations in which this is "impractical," allowance is made for the FMA to be executed by "authorized agents" of the owners, provided that seventy-five percent of the adult resident members of the landowning groups have given their written consent. *Id.*

¹⁰⁸ See Fingleton on Forestry Legislation, *supra* note 101, at 5.

¹⁰⁹ Forestry Act of 1991, Part III, Div. 5, § 63 (1-3). Project Guidelines are developed through Development Options Studies, Forestry Act of 1991, Part III, Div. 5, Subdiv. A, § 62. The government's record on fulfilling the mandates of the Development Options Studies is poor, as it has failed to carry out any form of study that meets the requirement that it must make a preliminary assessment of the likely socioeconomic impact of the project so that the landowners can make informed decisions. See *State Versus Custom*, *supra* note 7, at 253. Further, any application for timber permits must be accompanied by an environmental plan approved under the Environmental Planning Act. Forestry Act of 1991, Part III, Div. 5, Subdiv. C, § 77. Inadequate funding and capacity curtail implementation of the environmental plans. See Fingleton on Forestry Legislation, *supra* note 101, at 36. Although PNG has one of the most elaborate systems for forestry sector planning, it may be so complex that it is unlikely to produce its intended benefits. *Id.* at 15-16, 32.

¹¹⁰ RENNER, *supra* note 6, at 16.

type and amount of infrastructure the timber company is to construct, or the rate at which timber is harvested.¹¹¹ They also lack the freedom to negotiate royalties.¹¹² Finally, they are subject to license transfers, a banned practice that continues due to lack of enforcement.¹¹³

Perhaps the most troubling effect of the Act involves the redefinition of customary leadership roles. Leaders of indigenous landowning groups think that the reform process threatens their leadership positions within their own communities.¹¹⁴ They believe they are nothing more than the puppets of logging companies and can no longer claim to represent the interests of their communities.¹¹⁵ Despite this perceived lack of control, leaders of indigenous landowning groups do not challenge logging companies because the companies continue to offer lucrative profits to the indigenous groups.¹¹⁶ Thus, their leadership decisions fail to meet the resource and social needs of the communities.¹¹⁷ This scenario has been repeated time and again in many developing countries faced with reconciling customary law and formal statutory law.¹¹⁸ Upending the local institutional roles and regulations already in place has intensified the debates over power and authority and increased the competition for now commercially valuable resources.¹¹⁹

Faced with state-imposed limits on control over their resources, local landowning groups are advocating for increased strength of their ownership of forest resources.¹²⁰ They seek the security of customary ownership and

¹¹¹ *Id.* at 17.

¹¹² ROBERT MITCHELL, PROPERTY RIGHTS AND ENVIRONMENTALLY SOUND MANAGEMENT OF FARMLAND AND FORESTS, RURAL DEVELOPMENT INSTITUTE, 37 (2004). Instead of royalties, a log export tax is imposed on the timber concessionaires. *Id.* The government shares a portion of the revenue with customary landowners, but this is at most twelve percent of the market value of logs, a highly inequitable distribution. *Id.*

¹¹³ See Fingleton on Forestry Legislation, *supra* note 101, at 37. Logging companies perform company takeovers, in which they obtain a license through legal means, but then sell all of their shares to a different company that is not subject to the license agreements. Customary owners then find strangers cutting the forests on their customary lands, with no adherence to the Project Guidelines. *Id.*

¹¹⁴ See generally Simpson, G., 'Get What You Can While You Can': The Landowner-Government Relationship in West New Britain, in *THE POLITICAL ECONOMY OF FOREST MANAGEMENT IN PAPUA NEW GUINEA* 17, 33 (Colin Filer, ed., 1996).

¹¹⁵ *Id.* at 33.

¹¹⁶ See Fingleton on Forestry Legislation, *supra* note 101, at 34.

¹¹⁷ *Id.* at 33.

¹¹⁸ See Raja Devasish Roy, *Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh*, 21 ARIZ. J. INT'L & COMP. L. 113, 158 (2004).

¹¹⁹ David Mosse, *From State Bureaucracy to People's Participation: A New Moral Economy for Water?*, in *THE RULE OF WATER: STATECRAFT, ECOLOGY AND COLLECTIVE ACTION IN SOUTH INDIA* 288 (2003).

¹²⁰ ARMITAGE, *supra* note 105, at 4.

freedom from restrictions in negotiation. Several existing mechanisms can facilitate these goals.

2. *The PNG Government Should Revise the Forestry Act of 1991 to Give Customary Forestland Owners Legally-Enforceable Rights*

The Act should allow customary forest landowners to self-determine their development paths through direct negotiation with logging companies that result in legally-enforceable contracts.¹²¹ As the law currently stands, there is no legal relationship and no privity of contract between the local landowners and forest rights purchasers.¹²² Not only are the local landowners excluded from final negotiations over the timber rights, but they also cannot sue for any breach of concession agreements, even though such breach affects their own forests.¹²³ Thus, revisions to the Act must lift the restrictions on direct dealings between customary owners and commercial timber companies.¹²⁴

Lifting these restrictions will allow direct negotiations, which can help local landowners to acquire political, administrative, and technical skills.¹²⁵ Giving appropriate information and professional advice to the customary landowners is essential.¹²⁶ To balance negotiation inequities and strengthen customary landowners' bargaining power, legislation must support, rather than supplant, custom.¹²⁷ Because customary ownership is often held communally, group decision-making processes will check direct negotiations, raising the transaction costs of development and slowing the rush to sell valuable resources.¹²⁸ If customary law requires an individual to seek the clan's permission in order to sell his land, and that individual ignores this law, the sale is typically considered void.¹²⁹ Furthermore, land

¹²¹ See generally RENNER, *supra* note 6, at 74-76.

¹²² See WORLD BANK INSPECTION PANEL, *supra* note 4, at 19. Privity of contract is defined as the relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so. BLACK'S LAW DICTIONARY 556 (Second Pocket Ed. 2001).

¹²³ See WORLD BANK INSPECTION PANEL, *supra* note 4, at 19.

¹²⁴ COLIN HUNT, PRODUCTION, PRIVATIZATION AND PRESERVATIONS IN PAPUA NEW GUINEA FORESTRY iii (Colin Hunt ed., 2002).

¹²⁵ See *State Versus Custom*, *supra* note 7, at 266.

¹²⁶ See Fingleton on Forestry Legislation, *supra* note 101, at 35.

¹²⁷ *State Versus Custom*, *supra* note 7, at 258. Legislation already in place allows investigation into the fairness of dealings done under the forestry laws repealed by the Forestry Act of 1991. See Fingleton on Forestry Legislation, *supra* note 101, at 34.

¹²⁸ Cooter, *supra* note 13, at 787.

¹²⁹ *Id.*

court cases suggest that respecting the equities of a dispute by adhering to custom provides cooperation and development in the long run.¹³⁰

Revisions allowing direct negotiations based on group decision-making processes can meet many needs. Customary groups may negotiate (or renegotiate) the basic conditions of project development, especially the priorities for social and economic infrastructure.¹³¹ They may formulate and apply rules for the distribution of project revenues earmarked for the benefit of the entire community.¹³² Furthermore, revising the Act would facilitate local monitoring of the developers' compliance with timber permits and environmental planning conditions and would enable customary owners to seek compensation for any breaches of such conditions.¹³³ Finally, direct negotiations could enable customary landowners to lobby the government or the developer for greater community access to project employment or business development opportunities.¹³⁴

Revising the Act in order to meet the aforementioned needs of customary landowners is essential, but it cannot happen in a framework of underdeveloped customary property law.¹³⁵ Resolving claims to land and disputes about development between customary landowning groups is crucial to strengthening customary ownership rights. The Land Disputes Settlements Act of 1975 created a system of courts to resolve disputes involving land under customary ownership. Both the procedural customary law and substantive customary property law of these courts, however, require further development.¹³⁶

D. Underdevelopment of Customary Ownership Rights Currently Limits the Land Courts' Ability to Enforce Them

Problems arise when deciding who actually owns land under customary law. The Land Groups Incorporation Act of 1974 allows indigenous people to form a Land Group in order to enter an FMA with the

¹³⁰ *Id.* at 788, n.82. To illustrate, two parties developed a joint cattle project on marginal riverine swampland over which village pigs formerly enjoyed free range. The land later increased in value because it proved suitable for a coffee plantation. Each of the two parties claimed it, but the magistrate held that they had an equal interest in it, so development would require cooperation between them. *Id.*

¹³¹ See KATHY WHIMP, *DECONSTRUCTING INCORPORATION: INDIGENOUS LAND OWNERS AND REPRESENTATION IN PNG AND AUSTRALIA* 16 (1998).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Cooter, *supra* note 13, at 773. "The formalization of customary law by the land courts has not proceeded far enough to eliminate the uncertainties and risks attending these transactions." *Id.*

¹³⁶ *Id.*

National Forest Authority. This FMA must now be made pursuant to the Forestry Act of 1991.¹³⁷ Registering a Land Group does not involve any adjudication regarding the ownership of land.¹³⁸ Thus, the National Forest Authority risks entering a legal contract for the purchase of timber rights from land that may only belong to the customary landowners through color of their own assertion.¹³⁹ Substantive law regarding the determination of ownership of this land has only begun to take shape, with local land courts facilitating the effort.¹⁴⁰

1. *The System of the Local Land Courts, Although Well-Established and Sensitive to the Customs of Different Localities, Requires Further Refinement*

The Land Disputes Settlement Act created a system of courts to resolve land disputes involving land under customary ownership.¹⁴¹ Claimants bring suits before an appointed panel of mediators.¹⁴² They are usually indigenous, elderly men with little formal education, who command great respect due to their knowledge of unique rules and principles of custom in their region.¹⁴³ If a settlement seems possible after hearing the two sides of a dispute, the mediators may propose one.¹⁴⁴ If accepted, this settlement could be the end of the legal process.¹⁴⁵

If unsuccessful, mediators may refer the dispute to the local land courts.¹⁴⁶ In land courts, a magistrate presides along with mediators, and reviews the case *de novo*.¹⁴⁷ Although these are new mediators, close community ties and communication mean that people sitting on the court

¹³⁷ See *supra* note 107 and accompanying text.

¹³⁸ RESOURCE OWNERS, *supra* note 9, at 182. Incorporation of a land group is not recognition of an award of customary title. *Id.*

¹³⁹ RESOURCE OWNERS, *supra* note 9, at 182.

¹⁴⁰ See e.g., *State v. Giddings* [1981] P.N.G.L.R. 423; *Re Hides Gas Project Land* [1993] P.N.G.L.R. 309; *Ene Land Group Inc. v. Fonsen Logging* [1998] P.G.N.C. 9; *Tomu for and on behalf of Luhaliu Clan of Samberigi, Southern Highlands Province and Jimmy Kenotiki Kinobu for and on behalf of Imawe Kew Clan of Kaiama No 2 Village, Kikori, Gulf Province v. The Independent State of Papua New Guinea*, *Winton Sale* [1996] P.N.G.L.R. 101.

¹⁴¹ CUSTOMARY LAND TENURE, *supra* note 58, at 35.

¹⁴² *Id.* Lawyers are usually excluded in order to keep proceedings simple and non-technical. *Id.* Exclusion of lawyers also ensures that traditional people will have access to the proceedings and the decisions will be intelligible. *Id.* Provincial Land Dispute Committees appoint these mediators. *Id.*

¹⁴³ Cooter, *supra* note 13, at 788.

¹⁴⁴ CUSTOMARY LAND TENURE, *supra* note 58, at 35.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

often have knowledge of the dispute.¹⁴⁸ Not only must these courts record boundaries, but they must also make explicit, authoritative statements of customary law.¹⁴⁹ If resolution does not come from the local land courts, parties may appeal to the provincial land courts, which require a fee.¹⁵⁰ A provincial court will examine the written record and call witnesses.¹⁵¹

The National Court hears appeals, but on a limited basis because this court has general, rather than just land, jurisdiction.¹⁵² The strongest basis for appeal is that the provincial court departed from its statutory mandate in deciding a case.¹⁵³ The National Court sees its role as overseeing the Land Dispute Settlement Act, not interpreting custom, and has decided that customary principles should be given substantive weight.¹⁵⁴

Several improvements are necessary to expedite the development of customary property law in PNG. First, magistrates need further training in common-law methods.¹⁵⁵ Second, the ban on lawyers should be lifted, as many members of customary groups have been or could be trained as lawyers.¹⁵⁶ Finally, these courts also need customary management to actually function as intended. A clan leader in East Sepik Province stated:

The fact is today that customary management is in dire need of improvement. The young men have a grasp of the problems but they don't have confidence in the elders who can be bamboozled into making decisions that are not in the long term interest of the clan. These discussions can be spurred by greed or even misguided respect for application of land, timber rights, etc. by rich and powerful people like National Ministers for example. Incorporation of Land Groups will give them a chance to develop decision making by committee, which will give an opportunity for the younger men. Just as customary law can be developed so also decision-making systems can be improved.¹⁵⁷

Enforcement of customary ownership by the local land courts will prove

¹⁴⁸ *Id.*

¹⁴⁹ Cooter, *supra* note 13, at 786.

¹⁵⁰ CUSTOMARY LAND TENURE, *supra* note 58, at 35.

¹⁵¹ *Id.*

¹⁵² *Id.* at 36.

¹⁵³ *Id.* at 35.

¹⁵⁴ See *State v. Giddings* [1981] P.N.G.L.R. 423.

¹⁵⁵ See Cooter, *supra* note 13, at 790.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.* at 789 n.84.

useless unless the rules of management are appropriate for the resource.

2. *Mediation and Adjudication of Land Disputes in the Land Courts Furthers the Needed Development of Customary Ownership of Forest Resources*

Despite the needed improvements, advantages of the local land courts allow them to perform adjudicative functions better than the political representatives in Parliament. Magistrates, who often do not serve in their home province, can act as disinterested parties, have fewer incentives to acquire power, have more local information based on the local land courts' records, and more legal expertise.¹⁵⁸ Furthermore, local courts are neutral arenas in which customary owners determine for themselves their own forms of ownership and development.¹⁵⁹

This local land court system is an appropriate, well-used, and functional mechanism capable of integrating customary ownership into the modern property regime of PNG.¹⁶⁰ Between 1976 and 1987, official statistics report an average of sixty-three disputes decided per year by the local land courts, with provincial land courts deciding an average of thirteen disputes per year.¹⁶¹ The requirement that land courts make explicit and authoritative statements on customary law also provides an example of the courts' ability to base decisions on unique aspects of custom. For instance, a magistrate in the highlands decided that land surrounded on three sides by the relatives of one of the disputants belonged to that disputant because only he could defend it.¹⁶² A magistrate in the case of Mundua Imbo and Damatagi Endemongo cited another determinative principle in 1982: "There is little point in a Land Court awarding a piece of land to a group if they will be unable to use it [due to] intimidation or other pressures from rival groups."¹⁶³ Similarly, a different magistrate ordered the owner of land to compensate the evicted trespasser to avoid further harassment by the trespasser and "his men."¹⁶⁴

The decisions of these courts make sense in their local context. They

¹⁵⁸ *Id.* at 792.

¹⁵⁹ CUSTOMARY LAND TENURE, *supra* note 58, at 46.

¹⁶⁰ See BERNARD NAROKOBI, LO BILONG YUMI YET: LAW AND CUSTOM IN MELANESIA 12-13 (Ron Crocombe et al. eds., 2003). Mr. Narokobi suggests that the area of land tenure was clearly defined in customary law.

¹⁶¹ *Id.*

¹⁶² *Id.* at 786.

¹⁶³ *Id.* at 787.

¹⁶⁴ Cooter, *supra* note 13, at 787.

reflect the unique rules and obligations of customary ownership that appropriately allocate land and resources. They represent a decentralized forum of resource management. The next section explores why these forms of management have survived, their adaptability to changing circumstances, and their potential to protect the forests of PNG from illegal logging.

IV. STRONGER CUSTOMARY OWNERSHIP OF FORESTS CAN BE EFFECTIVE AS AN INSTRUMENT TO PROTECT FORESTS FROM ILLEGAL LOGGING

Customary ownership, as a form of common property management, is an appropriate resource-allocation system for the forests of PNG because it provides an equitable and efficient mechanism for customary landowners to protect their forests. Customary landowners have, throughout history and though current popular protests, resisted attempts to convert customary ownership to freehold title.¹⁶⁵ As an adaptable form of relational property with obligations to current and future clan members,¹⁶⁶ customary ownership restrains decision-making processes, thus slowing the rush to sell valuable resources and instead encouraging investment in and protection of forests.

A. *Customary Ownership Has Survived Attempts to Convert It to Freehold Title*

Colonial policies attempted to eliminate customary land tenure, but failed to establish freehold title when faced with customary owners' continuing adherence to customary ownership practices.¹⁶⁷ In response to the failure of establishing freehold title and increased land disputes, the Australian administration created the Commission of Inquiry into Land Matters in 1972.¹⁶⁸ Membership was entirely indigenous and served to reassert primacy of customary title.¹⁶⁹ Subsequently, the enactment of the

¹⁶⁵ Freehold title is "an estate in land held in fee simple, fee tail, or for term of life." BLACK'S LAW DICTIONARY 295 (Second Pocket Ed. 2001).

¹⁶⁶ See Part IV.B.1, *infra*, for a discussion of relational property.

¹⁶⁷ See RESOURCE OWNERS, *supra* note 9, at 30. In order to facilitate use of their land as security for commercial credit, the Land Tenure (Conversion) Act of 1963 allowed members of customary landowning communities to obtain individual freehold title by mutual agreement with their fellow members. *Id.* It also allowed the Land Title Commission to demarcate and register the title of customary landowning groups. *Id.* This Act did not have the intended effect of liberating large amounts of land and only increased the amount of land disputes, which stalled any sort of use of the land and lacked a mechanism for adjudication. *Id.*

¹⁶⁸ *Id.* at 30.

¹⁶⁹ *Id.* at 30-31.

Land Groups Incorporation Act of 1974,¹⁷⁰ along with the previously mentioned Land Disputes Settlement Act of 1975, facilitated the return of alienated land to indigenous title.¹⁷¹ This resurgence of customary title (as opposed to freehold title which is inconsistent with traditionally communal forms of ownership),¹⁷² the requirements for group negotiations, and the establishment of local dispute resolution procedures has ensured a place for indigenous forms of production, culture, and identity.¹⁷³

Current popular sentiment in PNG reflects the importance of customary ownership as common property. In 2003, violent protests erupted in the capital of Port Moresby against an amendment to the Customary Land Act which would require registration of customary lands and produced fear that customary owners' rights to land would be undercut.¹⁷⁴ Conversion to freehold title is generally regarded as a political and economic failure.¹⁷⁵ In fact, most of the recent work of the Land Titles Commission has been reversion, in which customary landowners assert challenges to the agreements allocating their land in the first place.¹⁷⁶

B. Customary Ownership Curtails Unsustainable Practices and Provides an Adaptable Framework for Changing Circumstances

The group decision-making processes of customary ownership slow down those who are eager to sell timber rights for development, while

¹⁷⁰ *Id.* at 31. This Act allows indigenous people to form a landowner company in order to enter a FMA with the National Forest Authority. *Id.* Because the Act does not require identification of the land or the clan members in order to register, logging companies, anxious to streamline the process, are able to short-cut the procedures, but may end up entering a legally-binding contract with people whose ownership of land is only based on their assertions. *Id.* at 182.

¹⁷¹ *Id.* at 31.

¹⁷² See Cooter, *supra* note 13, at 760. Cooter notes that the wholesale conversion of rural land to freehold is tremendously disruptive to the economy and life of the countryside. *Id.*

¹⁷³ CUSTOMARY LAND TENURE, *supra* note 58, at 2. See also Minh Day, *Alternative Dispute Resolution and Customary Law: Resolving Property Disputes in Post-Conflict Nations, a Case Study of Rwanda*, 16 GEO. IMMIGR. L. J. 235, 250 (2001). "An effective dispute resolution model that incorporates [alternative dispute resolution] and customary law is less an imposition of a new modality than a retaining of existing practices." *Id.*

¹⁷⁴ Kalinga Seneviratne, *Development: Papua New Guinea Wants to Prove Skeptics Wrong*, Inter Press Service/Global Information Network, Dec. 15, 2003. See also Joel M. Ngugi, *Re-Examining the Role of Private Property in Market Democracies: Problematic Ideological Issue Raised by Land Registration*, 25 MICH. J. INT'L L. 467, 471-72 (2004). Professor Ngugi points out that while land registration is a technical exercise, it is also used to accomplish hidden political motives. *Id.* He goes on to note that capturing customary rights is often done with the aim of transforming the rights of various groups, using Kenya as an example. *Id.* While the government envisioned complete commodification of the land, certain sectors refused to accept the near absolute powers of the individually registered owners. *Id.* Instead, they organized, invented, and mobilized customary norms to frustrate formalized registration. *Id.*

¹⁷⁵ See Cooter, *supra* note 13, at 779.

¹⁷⁶ See *id.* at 778.

providing an adaptable framework for long-term cooperation and development. As a form of relational property that creates obligations to current and future relationships, customary ownership curbs unsustainable practices and accommodates changing circumstances.

1. *Customary Ownership Is a Form of "Relational Property" That Serves Indigenous Groups More Appropriately Than "Market Property"*

In PNG, many customary land transactions take place between relatives.¹⁷⁷ The "web of mutual obligations" that binds people together in their indigenous kin networks constrains a seller's freedom to pursue his or her best advantage.¹⁷⁸ In contrast, in the common law countries from which PNG draws its formal legal framework, most land transactions are between people who only relate to each other on a commercial level, under a freehold regime that works best when parties do not have strong commitments to each other.¹⁷⁹

Relational property rules maintain an incentive structure where, in the long run, cooperation benefits everyone, while non-cooperation benefits no one.¹⁸⁰ Thus, self-interested people can still cooperate with one another through this community-enhancing framework.¹⁸¹ The relationships within indigenous groups serve as this framework, creating a complicated, yet flexible and familiar understanding between parties making decisions regarding the use of their forests.¹⁸² Thus, rather than working within a "market property" system, which enables strangers to transfer property rights in one-shot transactions, forest user groups work best within a framework of coordination and cooperation, creating "relational property" among kin.¹⁸³

¹⁷⁷ CUSTOMARY LAND TENURE, *supra* note 58, at 41.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* These countries include Australia and the United States. *Id.*

¹⁸⁰ *Id.* at 42.

¹⁸¹ *Id.* at 42.

¹⁸² Cooter, *supra* note 13, at 773. "An understanding supplies a vague, uncertain and flexible basis for coordination and cooperation. The parties rely on informal means of interpretation and enforcement, and they adjust the terms of the understanding in response to changing conditions." *Id.* In contrasting understandings with contracts, Robert Cooter points out that understandings may be preferable to contracts for a variety of reasons, including those parties who are in long-run relationships. *Id.* at 774. He uses game theory's demonstration that repeated play can solve problems of opportunism that occur in one-shot contracts. Thus, commitment to a long-run relationship may be superior to binding, legal agreements in the right circumstances. *Id.*

¹⁸³ CUSTOMARY LAND TENURE, *supra* note 58, at 42.

2. *The Obligations to Current and Future Relationships Amongst Clan Members Curtails Illegal Practices*

Unlike Western societies, where mutual obligations are minimal, the definitions of customary property law do not involve a person's right over things, but rather, obligations owed between persons in respect of things.¹⁸⁴ These obligations are to those within kinship groups, which in the context of land includes children and ancestors.¹⁸⁵ Extending relational property law to include these future generations curtails illegal logging practices, as the current users have customary obligations to maintain the resource for their children.¹⁸⁶ The Constitution of PNG also supports guardianship of resources for future generations.¹⁸⁷ Further, "[i]t is no exaggeration to say that a clan's land is sacred, since its dead have been buried in it from time immemorial."¹⁸⁸ Thus, indigenous groups possess the desire and incentive to protect their land out of respect for their ancestors and in order to maintain a resource base for future generations.

3. *The Adaptability of Customary Ownership Enables It to Accommodate Changing Circumstances*

Customary ownership's capacity for change arises from its origins as a practical interaction between kinsmen.¹⁸⁹ Like a language that evolved out of the necessity to trade with other cultures (for example, Adzera or Yabem, which are Austronesian languages spoken within PNG),¹⁹⁰ customary ownership evolved along with the necessity to allocate resources amongst related members of a clan. New situations required accomplishing spontaneous responses capable of addressing the situation without a formal set of procedures as to how to change the rules.¹⁹¹ Recognition of a change

¹⁸⁴ GLUCKMAN, *supra* note 56, at 171.

¹⁸⁵ ARMITAGE, *supra* note 105, at 3-5. In fact, the role of land is to ensure the survival of the clans traditionally through a high level of self-sufficiency. *Id.* at 3.

¹⁸⁶ Anastasia Telesetsky, *Graun Bilong Mipela Na Mipela No Tromweim: The Viability of International Conservation Easements to Protect Papua New Guinea's Declining Biodiversity*, 13 GEO. INT'L ENVTL. L. REV. 735, 752 (2001). "As an important part of their worldview, New Guineans generally associate both their given communal and individual rights to a piece of land with customary responsibilities to maintain the land." *Id.*

¹⁸⁷ PAPUA N.G. CONST., National Goals and Directive Princs., Goal V (1975).

¹⁸⁸ Cooter, *supra* note 13, at 772.

¹⁸⁹ CUSTOMARY LAND TENURE, *supra* note 58, at 39.

¹⁹⁰ The Rosetta Project, Long Now Foundation, Stanford University Libraries, <http://www.rosetta-project.org> (last visited Apr. 20, 2005).

¹⁹¹ CUSTOMARY LAND TENURE, *supra* note 58, at 39.

in custom by the local land court in Rabual provides an example.¹⁹² According to Tolai custom before 1953, leaders of the clan could decide whether to sell that clan's land.¹⁹³ As population pressure increased land values, the Tolai became alarmed that leaders were disposing of clan land for their own personal profits.¹⁹⁴ In order to address their concerns, customary law was changed and enforced by the courts.¹⁹⁵ Now, clan land cannot be sold without the agreement of all the affected members.¹⁹⁶ This demonstrates that substantial popular support for change in customary law can motivate the courts to respond accordingly.

Unlike statutory law, which tends to be inflexible, customary law is open to flexible interpretation by the newer generations, whose values and needs may change.¹⁹⁷ Thus, customary owners are more likely to accept and enforce customary law when they know that it can be adapted to fit the realities of their changing circumstances.¹⁹⁸ This adaptability allows customary ownership to be dynamic and responsive to the specific needs of the locality as circumstances change and development pressures increase.¹⁹⁹

C. *Recognition of Indigenous Rights of Resource Management Dramatically Increases the Protection of Forests*

Durable and ecologically sound resource management institutions are valuable in and of themselves and are even more valuable when they internalize norms of resource use that are consistent with the public interest.²⁰⁰ Local management of natural resources works most efficiently and effectively when rural communities, rather than the state, are involved in making their own investment decisions.²⁰¹ Many case studies investigate the decentralization of resource management, indicating the success of these allocative structures.²⁰² Examples of such decentralization in PNG include

¹⁹² Cooter, *supra* note 13, at 788.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Telesetsky, *supra* note 186, at 759.

¹⁹⁸ *See id.*

¹⁹⁹ Cooter, *supra* note 13, at 788.

²⁰⁰ Gregory Hicks & Devon G. Pena, *Community Acequias in Colorado's Culebra Watershed: A Customary Commons in the Domain of Prior Appropriation*, 74 COLO. L. REV. 387, 388 (2003).

²⁰¹ *See* AGARWAL AND NARAIN, *supra* note 3, at 7.

²⁰² *See e.g.*, JESSE C. RIBOT, *DEMOCRATIC DECENTRALIZATION OF NATURAL RESOURCES*, WORLD RESOURCES INSTITUTE (MARTHA SCHULTZ ED., 2002); AUGUSTA MOLNAR, ET AL., *WHO CONSERVES THE WORLD'S FORESTS? COMMUNITY-DRIVEN STRATEGIES TO PROTECT FORESTS AND RESPECT RIGHTS*, FOREST TRENDS (2004).

the Integrated Conservation and Development pilot sites at Lak and Ramu.²⁰³

The failure of the Lak pilot and the success of the Ramu pilot demonstrate that the most successful programs give full information to landowners and build consensus around development options.²⁰⁴ These pilot sites, combined with case studies from around the world, "show that open and participatory village institutions which have been given clearly defined property rights, remain the best institutions to manage conflict and determine burden- and benefit-sharing within communities."²⁰⁵ Landowners involved in negotiations with the timber industry have retained their land and have generally not been displaced from their traditional villages.²⁰⁶ Further, a process that allocates resources in a more participatory and accountable way contributes to better forest management and reduces social conflict.²⁰⁷ Thus, customary landowners have also been successful in some regions when establishing their own development projects, such as small-scale forestry projects.²⁰⁸ They recognize that while their forests give them access to the monetary sector, they are also valuable resources that must be sustained and protected for future generations.²⁰⁹

Furthermore, because they are dependent upon their forests, customary owners with recognized rights are effective protectors of their resource. As noted earlier, many groups in PNG are entirely dependent upon the tropical rainforests for their survival needs and have created landscapes that have resulted from long-term interactions with their environments.²¹⁰ Thus, "[i]n many situations, groups who claim rights to trees and other forest products may be particularly efficient in guarding against unplanned harvesting of trees and forest products, especially where the group has traditionally regarded the forest as its common property

²⁰³ U.N., EARTH SUMMIT +5, SPECIAL SESSION OF THE GENERAL ASSEMBLY TO REVIEW AND APPRAISE THE IMPLEMENTATIONS OF AGENDA 21: SUCCESS STORIES FROM ASIA AND THE PACIFIC, at <http://www.un.org/esa/earthsummit/gef2.htm> (last visited Apr. 20, 2005). The Lak site failed due to difficulties with ongoing and substantial conflicts with land use. *Id.* To avoid a similar problem, the Ramu site is focusing on engaging the community and determining the social feasibility of conservation sites. *Id.*

²⁰⁴ ENVIRONMENT MONITOR, *supra* note 12, at 11.

²⁰⁵ AGARWAL AND NARAIN, *supra* note 3, at 30.

²⁰⁶ *State Versus Custom*, *supra* note 7, at 262.

²⁰⁷ See TACCONI, *supra* note 2, at 10.

²⁰⁸ GUSTAFSSON, *supra* note 30, at 6. See also Ron Martin, *Small-Scale Community Based Forestry: Issues in the Conservation of Papua New Guinea's Biodiversity*, in THE POLITICAL ECONOMY OF FOREST MANAGEMENT IN PAPUA NEW GUINEA 269, 270 (Colin Filer ed., 1997).

²⁰⁹ GUSTAFSSON, *supra* note 30, at 6.

²¹⁰ U.N. CSD, *Implementation of Forest-Related Decisions of the UNCED at the National and International Levels, Including the Examination of Sectoral and Cross-Sectoral Linkages*, Programme Element I.3: Traditional Forest Related Knowledge, E/CN.17/IF/1996/9, paras 16-19 (1996).

resource."²¹¹ Even in cases where the state has tried to assert management over forests, "group management may be a better alternative for preserving threatened forests where state administrative capacity is not adequate at the local level"²¹² Such is the case in PNG, where customary owners have continued to adhere to their traditional forms of forest management and control, calling for even greater strength of their ownership rights under growing pressure from commercial logging.²¹³

V. CONCLUSION

Of the various forest sector issues, the costs of illegal logging and forest corruption remain the areas of greatest concern.²¹⁴ In PNG, where a large majority of the population remains rural and dependent upon natural resources for subsistence economies, loss of forest resources to illegal logging can be devastating to local and indigenous communities.

To secure their customary ownership, the indigenous people of PNG can turn to constitutional and international instruments. However, the Forestry Act of 1991 and the underdevelopment of customary property law in the local land courts curtail the sovereignty of customary ownership. Thus, the Act should be revised to allow direct negotiations, subject to customary law, between customary landowners and loggers. The local land courts have begun developing a legal basis for customary ownership and should continue to be the forum for the evolution of this ownership.

As an adaptable framework comprised of long-term kin obligations, customary ownership can be effective in protecting forests. Due to their connection to and reliance on the forests, indigenous Papua New Guineans can present the first line of defense in preventing the devastating consequences of illegal logging.

²¹¹ Mitchell, *supra* note 112, at 29.

²¹² *Id.* at 30.

²¹³ ARMITAGE, *supra* note 105, at 1.

²¹⁴ WB SUSTAINING FORESTS, *supra* note 1, at appendix A-23.